

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CHERYL MARCHAND,  
Plaintiff,  
v.  
GRANT COUNTY,  
Defendant.

NO. CV-07-182-RHW

**ORDER DENYING, IN PART,  
AND GRANTING, IN PART,  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for Summary Judgment (Ct. Rec. 27). The motion was heard without oral argument.

Plaintiff is bringing § 1983 claims against Grant County, Washington for deprivation of her constitutional rights to freedom of association, freedom of speech, liberty, and due process, and a state law claim for false arrest. Plaintiff originally filed her complaint on May 14, 2007 Chelan County Superior Court. Defendant filed for removal of the case to the Eastern District of Washington on June 4, 2007. Defendant now moves for summary judgment.

**BACKGROUND FACTS**

The following facts are taken from the parties' pleadings and are presented in the light most favorable to Plaintiff, the non-moving party.

This case stems from two separate incidents that occurred in 2005 and 2006, involving the Grant County Fair (hereinafter "Fair"). The first incident occurred during the 2005 Fair.

1 Plaintiff is involved with the local 4-H horse program. She is a trainer and  
2 had some of her students showing at the Fair. She had three of her horses boarded  
3 at the fair, and was staying in her motor home on the fairgrounds during the fair.

4 On the night in question, Plaintiff was asked to man the horse gate at the  
5 fair. While she was at the gate, Glenna Courneya, the Fair's Western Games  
6 Chairperson, asked Mary Lou and Travis Langley to take Plaintiff's place.<sup>1</sup>

7 According to Plaintiff, Ms. Langley came up to the gate and pushed her out  
8 of the way, without discussing or notifying her that she was being replaced. Ms.  
9 Langley stated something like, "that's okay. We'll take care of this."

10 Plaintiff became upset and said, "What the hell?" She then turned around  
11 and walked out of the building. Plaintiff thought about what happened as she  
12 walked away, and decided to go back to speak with Ms. Langley again. She  
13 walked up to her and whispered, "You will never waste my time again like this,  
14 you asshole." Plaintiff was upset because she has spent a couple of hours at the  
15 gate and she felt she was being summarily dismissed.

16 Plaintiff then went to her motor home and began to relax. Minutes later,  
17 there was a knock on her door. She opened the door and two Grant County Sheriff  
18 Officers were standing there. They asked her if she was Cheryl Marchand, and she  
19 answered, "Yes." One of the officers said that the Grant County Fair Board wants  
20 you out of here five minutes ago. He asked whether Plaintiff had a problem with  
21 someone, and she replied that she had. He told her again that the Fair Board  
22 wanted her gone, and told her to get her shoes on and come outside. He told her  
23 that the gates would be opened to permit her to take her motor home, horse trailers,  
24 and equipment home. Plaintiff went to the stalls and began to take down her  
25 posters and decorations. She loaded up the hay, her tack, and began packing the  
26 horse trailer. She was told that she could not take her horses home. When she

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27  
28 <sup>1</sup>Ms. Courneya believed that Plaintiff was wearing open-toed shoes, which  
was against policy. Plaintiff disputes that she was wearing open-toed shoes.

1 went to the horse barn, there were two Grant County Sheriffs on horses. They hold  
2 her that she was not going to be able to take the horses home.

3 Plaintiff continued to remove her tack and load her horse trailer. There were  
4 people milling around. Gary Ribail was also there. Plaintiff approached Gary  
5 Ribail<sup>2</sup> and indicated that she was going to hold him responsible for her horses.  
6 Mr. Ribail then said that she could take them home. Plaintiff then loaded up her  
7 horses and hay.

8 After Plaintiff left the area and returned to her motor home, Ms. Langley  
9 complained to Bonnie Rae, the Director of the Horse Arena and member of the Fair  
10 Board about Plaintiff's behavior. Ms. Langley accused Plaintiff of threatening her.  
11 She told Ms. Rae that she was fearful of Plaintiff. Ms. Rae radioed Gary Ribail  
12 and reported that Plaintiff had verbally assaulted Mary Lous Langley. Ms. Langley  
13 was upset. She stated that Plaintiff had confronted her and she believed that  
14 Plaintiff has threatened her physical well-being. She stated that Plaintiff had used  
15 a number of profanities and had done so in a loud manner. Mr. Ribail asked Ms.  
16 Langley to provide a written statement of what happened, which she did.

17 Mr. Ribail then consulted with Al Holman, the Grant County Fair and  
18 Facility Manager. Based on Mr. Ribail's prior knowledge of two incidents in the  
19 past at the Fair in which Plaintiff had to be warned about her use of profane  
20 language, Mr. Holman and Mr. Ribail concluded that Plaintiff's conduct  
21 warranted ejecting her from the Fair. Specifically, they concluded that Plaintiff  
22 violated the Guest Code of Conduct. Mr. Ribail contacted a Grant County  
23 Sheriff's deputy and asked that he contact Plaintiff that she needed to leave the  
24 Fair.

25 Prior to the 2005 Fair, the Fair Board passed a Code of Conduct for Fair  
26 patrons. The Code was written by Mr. Ribail and published in the 2005 Fair

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27 <sup>2</sup>In 2005, Mr. Ribail was the Chairman of Security and Parking for the Grant  
28 County Fair.

1 Tabloid, which was handed out to patrons as they entered the Fair.

2 The Grant County Fair Guest Code of Conduct states:

3 The Grant County Fair Association is committed to creating a  
4 safe, comfortable and enjoyable experience for our guests at Grant  
County Fair and Spring Fair/Home Show on the Grant County  
Fairgrounds.

5 Our staff will proactively intervene to support an environment  
6 where guests can enjoy the Fair experience free from unacceptable  
behavior, including the following:

- 7 • Foul/abusive language or obscene gestures
- 8 • Intoxication or other signs of impairment related to  
alcohol consumption
- 9 • Displays of affection not appropriate in a public, family  
setting
- 10 • Obscene or indecent clothing
- 11 • Any disruption of the events and attractions, including  
throwing of objects or trespassing on the show ring,  
context or in restricted areas
- 12 • Fighting, taunting, or making threatening remarks or  
gestures.

13 Any guest not adhering to the above code or behavior in an unruly  
14 manner will be removed from the Fairgrounds. The Grant County  
Fair and Fairgrounds management reserve the right to determine what  
is unruly or unacceptable behavior, warranting removal.  
(Ct. Rec. 32-2).

15 The second incident Plaintiff complains of occurred when in April, 2006, the  
16 Fair Board voted to ban Plaintiff from attending both the Spring and Fall Fairs.  
17 The Board sent Plaintiff a letter advising her of the Fair Board's decision. In the  
18 letter, Plaintiff was notified that she had an opportunity to appeal the Board's  
19 decision, which she did. A hearing was held in June, 2006. At the hearing,  
20 Plaintiff and her counsel presented argument, in which Plaintiff told a much  
21 different version of the events in question. Consequently, the Fair Board decided  
22 to allow Plaintiff to attend future Grant County Fairs if she signed an agreement  
23 promising that if any future problems arose she would forfeit her right to attend  
24 future fairs. It was Plaintiff's understanding that someone from the Board would  
25 be drafting the letter of agreement and sending it her counsel. It does not appear  
26 the letter was ever drafted, or if it was that Plaintiff received a copy of the letter.  
27

#### 28 STANDARD OF REVIEW

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1 Summary judgment is appropriate if the "pleadings, depositions, answers to  
2 interrogatories, and admissions on file, together with the affidavits, if any, show  
3 that there is no genuine issue as to any material fact and that the moving party is  
4 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine  
5 issue for trial unless there is sufficient evidence favoring the nonmoving party for a  
6 jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477  
7 U.S. 242, 250 (1986). The moving party had the initial burden of showing the  
8 absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
9 325 (1986). If the moving party meets its initial burden, the non-moving party must  
10 go beyond the pleadings and "set forth specific facts showing that there is a  
11 genuine issue for trial." *Id.* at 325; *Anderson*, 477 U.S. at 248.

12 In addition to showing that there are no questions of material fact, the  
13 moving party must also show that it is entitled to judgment as a matter of law.  
14 *Smith v. University of Washington Law School*, 233 F.3d 1188, 1193 (9th Cir.  
15 2000). The moving party is entitled to judgment as a matter of law when the  
16 non-moving party fails to make a sufficient showing on an essential element of a  
17 claim on which the nonmoving party has the burden of proof. *Celotex*, 477 U.S. at  
18 323.

19 When considering a motion for summary judgment, a court may neither  
20 weigh the evidence nor assess credibility; instead, "the evidence of the non-movant  
21 is to be believed, and all justifiable inferences are to be drawn in his favor."  
22 *Anderson*, 477 U.S. at 255.

#### 23 MUNICIPAL LIABILITY

24 Plaintiff is not asserting claims against any individuals in their individual or  
25 official capacity—rather, Plaintiff is alleging claims against Grant County,  
26 Washington. Thus, she must establish *Monell* liability—that is, she must establish  
27 that her constitutional rights were violated as a result of an official policy or  
28 custom. *Monell v. Dep't of Social Services*, 436 U.S. 658, 690-91 (1978). To

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impose liability on a local governmental entity for failing to act to prevent a deprivation of constitutional rights, a § 1983 plaintiff must establish: (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy “amounts to deliberate indifference” to the plaintiff’s constitutional right; and (4) that the policy is the “moving force behind the constitutional violation.” *Oviatt v. Pierce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989)).

There are three ways to meet *Monell's* policy or custom requirement: (1) where a city employee commits the alleged constitutional violation pursuant to a formal government policy or a “longstanding practice or custom which constitutes the ‘standard operating procedures’ of the local government entity””; (2) where the individual who committed the constitutional tort was an official with “final policy-making authority” and that the challenged action itself thus constituted an act of official government policy; and (3) where an official with final policy-making authority ratified a subordinate’s unconstitutional decision or action and the basis for it. *Hopper v. City of Pasco*, 241 F.3d 1067, 1083 (9<sup>th</sup> Cir. 2001)(citations omitted).

## DISCUSSION

Defendant argues that Plaintiff cannot establish *Monell* liability because first, her constitutional rights were not violated; second, she cannot show that the policy represented a deliberate indifference to her constitutional rights; and third, she cannot establish causation—that is, that a policy or custom was the moving force behind the alleged constitutional violation. Plaintiff is asserting three constitutional claims against Grant County—Free Speech, Due Process, and Freedom of Association. Each of these will be addressed in turn.

### A. Free Speech

In determining whether Plaintiff's Free Speech rights were violated the Court must first determine the nature of the forum that was created by the

1 Government, and then determine whether the Guest Code is facially  
 2 unconstitutional or whether it was unconstitutionally applied. to Plaintiff.

3 The forum at issue in this case is a county fair. The Court finds that the  
 4 county fair is a limited public forum. *See Hodge v. Lynd*, 88 F. Supp. 2d 1234,  
 5 1241 (D.N.M. 2000). A limited public forum is treated the same as nonpublic  
 6 fora—that is, restrictions that are viewpoint neutral and reasonable in light of the  
 7 purpose served by the forum are permissible. *Hopper*, 241 F.3d at 1074.

### 8 **1. Facial Challenge**

9 In applying rational review to the Guest Code of Conduct, the Court finds  
 10 that it meets constitutional scrutiny. As the district Court of New Mexico  
 11 explained:

12 These entertainment events are open to any member of the  
 13 general public who can pay the admission, and access to the events is  
 14 not restricted to authorized persons, as it is in the case of  
 15 limited-access facilities. On the other hand, the events are organized  
 16 and presented for particular purposes or combinations of purposes.  
 17 Events such as the Fair or the state fair, for example, provide (among  
 18 other things): (1) entertainment in the form of the rodeo and the  
 19 carnival rides; (2) education, through the exhibits; and (3) competition  
 20 in animal husbandry and other skills, in the awards for best livestock,  
 21 baking contests, and other competitions. *See Mood For A Day*, 953  
 22 F.Supp. at 1261. The government entity sponsoring a fair or concert  
 23 has an interest in ensuring that the particular purposes for the event  
 24 are met, and in excluding individuals who are disrupting the event in  
 25 some manner or who threaten to do so. This is so even if the  
 26 individuals are not in violation of any law, but are merely violating  
 27 the rules of the event. Therefore, the government has more authority  
 28 to exclude individuals from events such as the Fair than from a public  
 street or park.

*Cite.*

### 22 **2. As Applied Challenge**

23 Defendant argues that the Guest Code of Conduct was not unconstitutionally  
 24 applied to Plaintiff because the words she uttered are not words protected by the  
 25 First Amendment. The Court agrees.

26 The right of free speech is not absolute. *Chaplinsky v. State of New*  
 27 *Hampshire*, 315 U.S. 568, 571 (1942). In *Chaplinsky*, the Supreme Court made the  
 28 following observation:

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1        There are certain well-defined and narrowly limited classes of  
2 speech, the prevention and punishment of which has never been  
3 thought to raise any Constitutional problem. These include the lewd  
4 and obscene, the profane, the libelous, and the insulting or ‘fighting’  
5 words—those which by their very utterance inflict injury or tend to  
6 incite an immediate breach of the peace. It has been well observed  
7 that such utterances are no essential part of any exposition of ideas,  
8 and are of such slight social value as a step to truth that any benefit  
9 that may be derived from them is clearly outweighed by the social  
10 interest in order and morality. ‘Resort to epithets or personal abuse is  
11 not in any proper sense communication of information or opinion  
12 safeguarded by the Constitution, and its punishment as a criminal act  
13 would raise no question under that instrument.’

14 *Id.* at 572

15        Plaintiff admits that at a minimum, she said, “What the hell?” and “You will  
16 never waste my time again like this, you asshole.” While the Court does not find  
17 that Plaintiff’s words as threats, the Court finds that these words were not for the  
18 communication of information or an opinion and therefore are not safeguarded by  
19 the Constitution. Notably, the statements were directed to one person, Ms.  
20 Langley, and Plaintiff indicates that with respect to her second statement she  
21 whispered the words in Ms. Langley’s ears. The Court finds that Plaintiff’s Free  
22 speech rights were not violated when she was expelled from the Grant County Fair.

### 23 **B. Due Process Rights**

24        In her complaint, Plaintiff alleges that her due process rights were violated  
25 but does not identify whether she is alleging a substantive or a procedural due  
26 process claim.

27        The Court does not find that the right to attend a county fair implicates  
28 Plaintiff’s substantive due process rights. Courts have generally limited the  
protections of the substantive due process have to matter relating to marriage,  
family, procreation, and the right to bodily integrity. *Nunez v. City of Los Angeles*,  
147 F.3d 867, 871 n.4 (9<sup>th</sup> Cir. 1998). Substantive due process rights “protects  
individual liberty against ‘certain government actions regardless of the fairness of  
the procedures used to implement them’ ” *Id.*

On the other hand, Plaintiff has a liberty interest in attending the Grant



1 County Fair that requires procedural due process. *See Hodge*, 88 F.Supp.2d at  
2 1242. To prevail on her procedural due process claim, Plaintiff must show that she  
3 has a liberty interest that is protected by the Constitution; (2) a deprivation of the  
4 interest by the government; and a (3) lack of required process. *Portman v. County*  
5 *of Santa Clara*, 995 F.2d 898, 904 (9<sup>th</sup> Cir. 1993). “To satisfy procedural due  
6 process, a deprivation of life, liberty, or property must be ‘preceded by notice and  
7 opportunity for hearing appropriate to the nature of the case.’” *Lone Star Security*  
8 *& Video v. City of Los Angeles*, 572 F.3d 685, 694 (9<sup>th</sup> Cir. 2009). There are  
9 exceptions to the general rule of notice and opportunity to be heard. *Id.* The  
10 Government does not need to give notice in an emergency, or if notice would  
11 defeat the entire point of the seizure, or when the interest at stake is small relative  
12 to the burden that giving notice would impose. *Id.*

13 In this case, Plaintiff asserts that she was removed from Fair by the Board  
14 members without giving her an opportunity to address the allegations that were  
15 being levied against her. In order to determine whether Plaintiff’s due process  
16 rights were violated, the jury will have to consider a number of factors; for  
17 instance, the time delay from the confrontation and the decision to expel Plaintiff,  
18 whether an emergency situation prevented the Board members from first  
19 approaching Plaintiff prior to asking the sheriff officers to remove her from the fair  
20 grounds, whether the confrontation disrupted any events that were taking place, or  
21 whether the confrontation resulted in some injury to a fair-goer. In viewing the  
22 facts in the light most favorable to Plaintiff, the Court finds that a reasonable jury  
23 could find that Plaintiff’s due process rights were violated when she was expelled  
24 from the 2005 Grant County Fair without being afforded an opportunity to present  
25 her side of the story.

26 This does not end the inquiry, however, because Plaintiff is asserting claims  
27 against Grant County and therefore must establish *Monell* liability. To do so,  
28 Plaintiff must establish either the decision-making official was, as a matter of state

1 law, a final policymaking authority “whose edicts or acts may fairly be said to  
2 represent official policy” in the area of decision, or by showing that an official with  
3 final policymaking authority either delegated that authority to, or ratified the  
4 decision of, a subordinate. *Urich v. City and County of San Francisco*, 8 F.3d 968,  
5 985 (9<sup>th</sup> Cir. 2002) (citations omitted).

6 “The fact that a particular official-even a policymaking official-has  
7 discretion in the exercise of particular functions does not, without more, give rise  
8 to municipal liability based on an exercise of that discretion. The official must also  
9 be responsible for establishing final government policy respecting such activity  
10 before the municipality can be held liable.” *Id.* An official may be found to have  
11 been delegated final policymaking authority where “the official’s discretionary  
12 decision is [not] ‘constrained by policies not of that official's making’ and . . . [not]  
13 ‘subject to review by the municipality's authorized policymakers.’ ” *Id.* (citations  
14 omitted).

15 The Court finds that a reasonable jury could find that Mr. Ribail had final  
16 decision-making authority, that his decision to expel Plaintiff from the Grant  
17 County Fair did not afford Plaintiff any due process, and liability for this decision  
18 could be imputed to Grant County. As such, summary judgment is not appropriate.

19 Additionally, Plaintiff alleges that her due process rights were violated when  
20 the Fair Board voted to ban Plaintiff from attending both the Spring and Fall Fairs.  
21 Although the Fair Board acted unilaterally in April, 2006, when it voted to ban  
22 Plaintiff, it provided her notice and an opportunity to be heard regarding her  
23 expulsion, which occurred in June, 2006. At that hearing, the Board proposed a  
24 compromise to which Plaintiff and her attorney acquiesced. There is nothing in the  
25 record to suggest that she was subsequently denied access to attend other Fairs. As  
26 such, the Court grants summary judgment with respect to Plaintiff’s claim that her  
27 due process rights were violated when the Fair Board voted to ban Plaintiff from  
28 attending fairs, and then subsequently voting to reinstate her privileges.

1 **C. Freedom of Association**

2 “[I]“implicit in the right to engage in activities protected by the First  
3 Amendment is a corresponding right to associate with others in pursuit of a wide  
4 variety of political, social, economic, educational, religious, and cultural ends.”  
5 *Boy Scouts v. Dale*, 530 U.S. at 647. “The First Amendment's freedom of  
6 association protects groups whose activities are explicitly stated in the amendment:  
7 speaking, worshiping, and petitioning the government.” *IDK, Inc. V. Clark*  
8 *County*, 836 F.2d 1185, 1192 (9<sup>th</sup> Cir. 2007). In *Boy Scouts*, the Supreme Court  
9 held that the Boy Scouts organization engaged in expressive activity where their  
10 general mission was “to instill values in young people.” *Id.* at 649-50,

11 Here, Plaintiff was active in the 4-H community, whose purpose is to  
12 develop in youth leadership, citizenship and life skills.<sup>3</sup> The 4-H organization can  
13 be directly compared to the Boy Scouts of America. The Court finds that Plaintiff  
14 has a constitutional right to associate with other members of the 4-H community.

15 In *Villegas v. City of Gilroy*, 484 F.3d 1136 (9<sup>th</sup> Cir. 2007), the Ninth Circuit  
16 rejected the Top Hatters Motorcycle Club engaged in the type of activities that  
17 would be afforded First Amendment protections. In that case, the Club was  
18 prevented from attending the Gilroy Garlic Festival because of an unwritten policy  
19 of the Festival that provided that persons attending the festival not be permitted to  
20 wear gang colors or other demonstrative insignia, including motorcycle club  
21 insignia. The Circuit held that the Top Hatters Motorcycle Club right to  
22 association was not violated. The Circuit reasoned that the defendants’ refusal to  
23 permit the plaintiffs access to the festival only limited the plaintiffs’ access to a  
24 particular location—a location that had no relation to the purposes underlying their  
25 association with one another. *Id.* The same can not be said with respect to the  
26 Grant County Fair and the 4-H organization. Based on the Court’s experience, the

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28 <sup>3</sup>About 4-H, The 4-H Story, <http://www.4-h.org>. (last visited September 15, 2009).

1 county fair and 4-H go hand and hand, especially in the rural areas. Many of the 4-  
2 H youth show animals and enter projects in the county fair. To deny a person who  
3 participates in 4-H access to the county fair is to deny him or her access to the one  
4 event that epitomizes all for which the 4-H organization stands.

5 The Court finds that Plaintiff has a constitutional right to associate with  
6 other 4-H members, that the Grant County Fair expressly provides an opportunity  
7 for 4-H members to meet and engage in expressive activity, and that a reasonable  
8 jury could find that Plaintiff's right to associate was infringed upon when she was  
9 summarily removed from the Grant County Fair.

10 As discussed above, the Court finds that a reasonable jury could find that  
11 the removal of Plaintiff was the result of a final decision maker and therefore  
12 summary judgment is not appropriate.

13 The Court does not find that Plaintiff's right to association was violated by  
14 the Fair Board in its decision to ban Plaintiff from future fairs and subsequently  
15 reinstate her fair privileges, where Plaintiff acquiesced and agreed to the proposed  
16 resolution.

#### 17 **D. False Arrest**

18 Plaintiff is also asserting a state law claim for false arrest. Defendant argues  
19 that Plaintiff's claim must fail because she cannot establish that she was arrested.  
20 The Court agrees.

21 Under Washington law,

22 A person is restrained or imprisoned when he is deprived of  
23 either liberty of movement or freedom to remain in the place of his  
24 lawful choice; and such restraint or imprisonment may be  
25 accomplished by physical force alone, or by threat of force, or by  
26 conduct reasonably implying that force will be used. One acting under  
27 the apparent authority-or color of authority as it is sometimes  
28 described-or ostensibly having and claiming to have the authority and  
powers of a police officer, acts under promise of force in making an  
arrest and effecting an imprisonment.  
*Bender v. City of Seattle*, 99 Wash.2d 582, 591 (1983) (citation omitted).

Here, while Plaintiff was asked to leave the premises, her freedom was not

1 restrained once she left the fairgrounds. She was free to go where ever she wanted.  
2 Because Plaintiff cannot show that she was unlawfully arrested, it would be futile  
3 to permit her to amend her complaint to add a false arrest claim under § 1983.

4 **E. Conclusion**

5 The Court grants Defendant's Motion for Summary Judgment with respect  
6 to Plaintiff's free speech and false arrest claims, and denies Defendant's Motion  
7 for Summary Judgment with respect to her due process and freedom of association  
8 claims.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion for Summary Judgment (Ct. Rec. 27) is **DENIED**, in  
11 part, and **GRANTED**, in part.

12 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
13 enter this Order and to furnish copies to counsel.

14 **DATED** this 15<sup>th</sup> day of September, 2009.

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16  
17 *s/Robert H. Whaley*

18 ROBERT H. WHALEY  
19 United States District Judge

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